In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-872

BENJAMIN R. BURROUGHS,
Petitioner,

vs.

BOARD OF TRUSTEES OF THE PENSION TRUST FUND FOR OPERATING ENGINEERS, et al.,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

THOMAS E. STANTON, JR.,
JOHNSON & STANTON,
221 Sansome Street,
San Francisco, California 94104,

P. H. MCCARTHY, JR.,
MCCARTHY, JOHNSON & MILLER,
605 Market Street,
San Francisco, California 94105,
Attorneys for Respondent.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

Subject Index

Table of Authorities Cited

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-872

BENJAMIN R. BURROUGHS,
Petitioner,

VS.

BOARD OF TRUSTEES OF THE PENSION TRUST FUND FOR OPERATING ENGINEERS, et al.,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF RESPONDENT'S POSITION

Respondent Board of Trustees of the Pension Trust Fund for Operating Engineers submits that Burroughs' case is of such importance that certiorari should be granted as to the questions presented in its cross-petition on file with this Court, Docket No. 76-872. It submits that certiorari should not be granted as to the question presented by Burroughs' petition herein since the question as to the award of an attorney's fee was correctly decided by the District

Court, whose decision was affirmed by the Court of Appeals. It submits further that if Burroughs' petition is granted, justice requires that the Board's cross-petition also be granted, since if Burroughs should not have prevailed on his claim to a pension, he is clearly not entitled to an award of an attorney's fee, even if Section 302 of the Labor-Management Relations Act authorizes such an award to a prevailing litigant in a proper case.

REASONS FOR DENYING THE WRIT AS TO THE ISSUE OF ATTORNEYS' FEES

The decision of the District Court, affirmed by the Court of Appeals, is consistent with the holding of this Court in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612 (1975), for the following reasons:

1. Burroughs' case does not come within the common fund and common benefit exception to the American Rule disallowing attorneys' fees in the absence of express statutory provision therefor. That exception, as stated in Burroughs' petition (p. 7), permits "an equity court to award attorneys' fees where the prevailing litigant has conferred a substantial benefit on an ascertainable class of persons, and the granting of fees from a common fund will operate to spread the costs of the litigation among such persons." It is apparent from the facts of Burroughs' case, however, that the cost of any award to him of attorneys' fees could not be shifted to the beneficiaries of the decision in his favor.

In the respondent Board's cross-petition for certiorari we have shown that the District Court awarded Burroughs a pension of $155 per month for life on the basis of total employer contributions of $963.02 with respect to his work (cross-petition, p. 5). His accrued benefits under this award to date exceed $7800 (cross-petition, p. 16). The beneficiaries of the decision in his favor, if they could be identified, would be those covered employees who failed to work 350 hours for contributing employers in any one of the years 1958, 1959 and 1960 and needed two additional years to meet this requirement, and those other employees, if any, who failed to work 5 years in creditable employment under the Social Security Act within a 10 year period. Any employer contributions with respect to such marginal workers, as in Burroughs' case, would be rapidly exhausted by benefits payable under the Pension Plan, and the full burden of any attorneys' fee award would fall upon those who suffered from the decision, namely, the operating engineers actively employed in their trade who averaged 1500 hours or more of contributory employment annually (cross-petition, p. 4) and who would have to bear a disproportionate share of the cost of past service credit given to Burroughs and other operating engineers with work records similar to his.

The decision in *Kiser v. Huge,* 517 F.2d 1237 (1974), cited by Burroughs in support of his petition (p. 13), was a decision of a panel of the Court of Appeals for the District of Columbia which was superseded by that Court on rehearing *en banc* as to

every issue except the award of attorneys' fees (*Pete v. United Mine Wkrs. of Am. Welf. & R.F. of 1950,* 517 F.2d 1275 (1975)). The majority of the panel which wrote the *Kiser* opinion held that miners with as little as **one** year of contributory service were entitled to pension benefits from the Mine Workers Fund (517 F.2d at pp. 1250, 1262). On rehearing, the Court sitting *en banc* held that the Trustees of the Fund acted reasonably in requiring a minimum of **five** years of contributory service as a condition of eligibility for benefits (517 F.2d at p. 1286). Thus, the miners benefitting from the decision had all "performed substantial contributory employment" (517 F.2d at p. 1287) and there was therefore "reason for confidence that the costs [of the attorneys' fee award] could indeed be shifted with some exactitude to those benefitting" (*Alyeska Pipeline Service Co. v. Wilderness Society, supra,* 95 S.Ct. at p. 1621, n. 39).

It should be noted, further, that the reasoning of the Court in the *Pete* case casts serious doubt upon Burroughs' claim that the decision in his favor improved the institutional functioning of the Operating Engineers Fund as an entity.

In *Johnson v. Botica,* 537 F.2d 930 (7th C.A. 1976) the Court followed the reasoning of the *Pete* case in holding that an applicant with 16 years past work credit was properly denied a disability pension for the reason that, due to his disability, he could not meet a contributory employment requirement of 500 hours within a two year period after the inception of the pension plan. The Court said (p. 936):

"The appellant's argument focuses little attention on the duty and responsibility of the Trustees to establish an actuarially sound formula upon which an employee will be entitled to a pension. **In formulating the eligibility requirements, the Trustees could not responsibly have declared that anyone or everyone was entitled to pension benefits, regardless of the amount of contributions made in their behalf.** In the present case, we are considering the propriety of the Trustees' action in denying an application based upon 239 hours of work for which approximately $54.00 in contributions were made. **The Trustees had the responsibility to insure that pension benefits would be available to those who had more than a minimal amount of contributions made in their behalf.** The Plan had received no contributions based upon Johnson's prior years of service in the industry."[1]

In *Johnson v. Botica,* the applicant had no opportunity due to his disability to meet the 500 hour contributory employment requirement of the pension plan. In Burroughs' case, on the other hand, Burroughs had an entire construction season after notice of the break-in-employment rule to meet the less stringent 350 hour contributory employment requirement of that rule. Hence the decision in Burroughs' favor is inconsistent with the institutional functioning requirements for pension funds expressed in *Pete* and *Johnson.*

2. In the regulation of private welfare and pension plans Congress has made "specific and explicit

[1]Throughout this brief, emphasis is added unless otherwise noted.

provisions for the allowance of attorneys' fees" which negative any "roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted" (*Alyeska Pipeline Service Co. v. Wilderness Society, supra,* 95 S.Ct. at p. 1633).

When Congress first regulated such plans by Section 302 of the Labor-Management Relations Act, it not only did not provide for an allowance of attorneys' fees but it also carefully circumscribed the relief which a federal court could give under that statute.

In *Snider v. All State Administrators,* 481 F.2d 387 (5th C.A. 1973) *cert. den.* 415 U.S. 957, 94 S.Ct. 1484 (1974), the Court said (481 F.2d at p. 390):

> "In actions brought under section 302(e), a district court is in nowise limited in how deeply it may inquire into the structure and the administration of a union welfare trust fund into which employers have made contributions since a detailed study may be necessary to determine whether or not violations of federal law have occurred which would necessitate injunctive relief. **However, the federal court's ultimate exercise of adjudicatory power under this section is limited to the prevention of future violations since the Congress, as architect of its jurisdictional gambit, has not chosen to empower it to require an accounting or similar noninjunctive relief.** Blassie v. Kroger Company, supra, 345 F.2d at 67; Employing Plasterers Ass'n v. Journeymen Plasterers, supra, 279 F.2d at 97."

The legislative history of federal regulation of collectively bargained pension plans, referred to in respondent's cross-petition at pages 12-15, demonstrates that Congress has followed a deliberate, discriminating and selective policy with regard to such regulation, including provision for the allowance of attorneys' fees.

Congress first provided for such an allowance in section 9(c) of the Welfare and Pension Plans Disclosure Act, 29 U.S.C. §308(c), which authorized the court in an action against a fund administrator for a failure or refusal to make a publication requested under the Act, "in its discretion . . . to allow a reasonable attorney's fee to be paid by the defendant." Thereafter, when it enacted the Employee Retirement Income Security Act (ERISA) in 1974, it provided in Section 502(g), 29 U.S.C. §1132(g), that:

> "In any action under this subchapter by a participant, beneficiary, or fiduciary, the court in its discretion **may** allow a reasonable attorney's fee and costs of action to **either** party."

This selective process is precisely the procedure which this Court had in mind when it said in *Alyeska* that (95 S.Ct. at p. 1627):

> "Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of 28 U.S.C. §1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal

> litigation or **to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases."**

ERISA became effective on January 1, 1975 and specified that provisions which include the provisions of Section 502(g), quoted *supra,* "shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975" (Section 514(b)(1), 29 U.S.C. §1144(b)(1)). At the time Burroughs' claim arose, therefore, there was no federal statute authorizing an award of attorneys' fees in an action on the claim, and under the holding in the *Alyeska* case, the absence of such express authority precluded any such award.

> See: *National Woodwork Mfrs. Ass'n v. N.L.R.B.* (1967) 386 U.S. 612, 640, 87 S.Ct. 1250, 1266.

The decision in *Pete v. United Mine Wkrs. of Am. Welf. & R.F. of 1950,* 517 F.2d 1275, 1289 (App. D.C. 1975), *supra,* provides no support for Burroughs' claim. That case was decided before the decision in the *Alyeska* case and the Court did not consider the impact of that authoritative ruling of this Court. Further, the courts of the District of Columbia have greater jurisdiction over the conduct of the trustees of collectively-bargained funds than federal courts sitting within States, "since the federal courts are the only courts in the District of Columbia" (*Cuff v.*

Gleason, 515 F.2d 127, 129 (2d C.A. 1975), and there was an independent ground in the *Pete* case for awarding attorneys' fees against the fund because of the trustees' "protracted discriminatory conduct and breach of fiduciary duty" (see *Pete v. United Mine Wkrs. of Am. Welf. & R.F. of 1950, supra,* at pp. 1292-1293). There was no similar finding in Burroughs' case and no evidence to support such a finding.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should deny the petition of Benjamin R. Burroughs for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit as to the question relating to an award of attorneys' fees presented by that petition. We respectfully submit, further, that if this Court grants the petition of Burroughs, it should also grant the cross-petition of the Board of Trustees of the Pension Trust Fund for Operating Engineers on file herein under Docket No. 76-872.

Respectfully submitted,

THOMAS E. STANTON, JR.,
JOHNSON & STANTON,
P. H. MCCARTHY, JR.,
MCCARTHY, JOHNSON & MILLER,
Attorneys for Respondent.

January 21, 1977.

see

7 6

9 1 2